***United States Court of Appeals***

***for the Second Circuit***

# APPELLEE'S REPLY BRIEF

# 74-1277

ORIGINAL

*To be argued by*
GEORGE A. HAHN

In The

# United States Court of Appeals

For The Second Circuit

GEORGE FELDMAN, as Trustee in Bankruptcy of Leasing Consultants Incorporated, Bankrupt,

*Plaintiff-Appellee,*

*vs.*

CHASE MANHATTAN BANK, N.A.,

*Defendant-Appellant.*

*On Appeal from the United States District Court for the Southern District of New York.*

## SUR-REPLY BRIEF FOR PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS

For the Second Circuit

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Docket No. 74-1277

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Plaintiff-Appellee,

against

CHASE MANHATTAN BANK, N.A.,

Defendant-Appellant.

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ON APPEAL from the UNITED STATES DISTRICT COURT

for the SOUTHERN DISTRICT of NEW YORK

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# SUR-REPLY BRIEF FOR PLAINTIFF-APPELLEE

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## Preliminary Statement

Appellee obtained permission to prepare a Sur-Reply Brief because appellant's reply brief raised matter and discussed arguments not set forth in the appellant's original brief. This brief is accordingly in the nature of an

answer to appellant's reply brief.

## Point I

### THE ASSIGNMENT OF A LESSOR'S INTEREST UNDER AN AIRCRAFT LEASE AFFECTS AN INTEREST IN THE AIRCRAFT AND THEREFORE CONSTITUTES A CONVEYANCE WHICH MUST BE RECORDED FOR IT TO BE VALID AGAINST THIRD PERSONS WITHOUT ACTUAL NOTICE

Congress has required the filing for recordation of any conveyance which affects any interest in any civil aircraft. Federal Aviation Act of 1958, §503, 49 U.S.C. §1403. As noted by District Judge Bauman,

> "...the present possessory right and the entitlement to rentals conferred by the lease agreement are property 'interests' as the term has been generally understood; ... It then follows that assigning a lease 'affects' the lessor's interest by transferring its primary incident, the right to receive rentals." (A68)

Chase acknowledges the corectness of this analysis, but denies its applicability to the case at bar (Reply Br. at 4), claiming that it is "a superficial reading of the provisions of the Federal Aviation Act...and applicable regulations..." Reply Br. at 2. The trustee disagrees.

Chase attacks the integrity of the chattel paper concept created by the Code by seeking to separate the lessee's monetary obligations under the lease from the balance of the lease contract. The applicable portion of the Code definition of chattel paper reads:

> "... a writing ... which evidence[s] both a monetary obligation and ... a lease of specific goods ..." U.C.C. §9-105(b).

In creating this collateral category, the Code carefully distinguished it from two other collateral categories, "accounts" and "contract rights," into which the lessee's monetary obligations would logically fit. Thus U.C.C. §9-106 defines:

> " 'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. 'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper..."

Chase's argument must be viewed in the context of these Code definitions. Chase's Brief argues:

> "No one questions or doubts that possessory rights in equipment and the entitlement to rentals constitute property interests or that assignment of a lease affects the lessor's interest by transferring his right to receive rentals. But the relevant issue is not whether the lessor's property interests are effected, but rather, whether the

> assignment of such rentals affects...any interest in aircraft...to which the recording requirements of 49 U.S.C. §1403 are applicable; ..." Reply Brief at 4.

The possessory right in equipment mentioned by Chase is the lessor's reversion and is separate and apart from the lease. In re Leasing Consultants, Incorporated, 486 F.2d 367 (2d Cir. 1973). What interests, therefore, are conveyed when a lessor's interest under a lease is assigned? Looking to the Code definition of chattel paper it is obvious that its most important element is the lessee's monetary obligation under the contract. What distinguishes chattel paper from "accounts" or "contract rights" is the existence of a security agreement or lease agreement creating contractual rights which supplement the monetary obligations. It would be preposterous to conclude that the assignment of an aircraft lease would have to be federally filed in order to make these supplementary contractual rights valid against third parties while the monetary obligations are validly assigned under a separate body of law, i.e. the applicable state law. That is the unacceptable conclusion to which Chase's argument leads. Congress could not have intended such a result.

In the analgous situation of the assignment of a vendor's interest under a conditional sale contract, a situation where the regulations specifically require recordation for perfection, 14 C.F.R. §§49.17(d)(2) and 49.31(a), what is assigned is also a monetary obligation supplemented by contractual rights. The same is true for the assignment of a chattel mortgagee's interest. 14 C.F.R. §§49.17(e)(3) and 49.31(a).

The prime issue awaiting resolution by this court is whether security interests in aircraft chattel paper, i.e. security interests in aircraft leases, in chattel mortgages covering aircraft and in aircraft conditional sale contracts, can be perfected without filing the security agreement* with the Administrator. Do the federal act and regulations require the filing of all security interests in aircraft chattel paper? The answer is a resounding yes for assignments of chattel mortgages, Federal Aviation Act §101(17), 49 U.S.C. §1301(17), 14 C.F.R. §49.31(a), and conditional sale contracts, 14 C.F.R. §§49.31(a) and 49.17(d). Logic supports the

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* The term security agreement is used as per the Code definition, i.e. "... an agreement which creates or provides for a security interest." U.C.C. §9-105(h). See also U.C.C. §9-102(2).

district court's view that assignments of true leases are subject to the same treatment.

Finally, reiterating the argument made at Point II of appellee's answering brief, "... a security interest in property covered by a statute ... of the United States which provides for a national registration or filing of all security interests in such property ... can be perfected only by registration or filing under that statute ..." U.C.C. §§ 9-302(3) and (4). The Federal Aviation Act of 1958, 49 U.S.C. §1301 et seq., provides for the filing of all conveyances affecting interests in aircraft. 49 U.S.C. §1403. The assignment of lease/chattel paper at bar is one of those conveyances. The judgment below must be affirmed.

## Point II

## THERE IS A TRIABLE ISSUE REGARDING THE EXISTENCE OF A PURCHASE OPTION

As noted at page 9 of the trustee's answering brief:

> "Plaintiff-appellee believes that the chattel paper is in fact a conditional sale contract as defined at 49 U.S.C. §1301(16)(b). But this creates a triable issue of fact as to the existence of a purchase option. If the court determines that the assignment of a lessor's interest under an aircraft lease is not a recordable conveyance, but that the assignment of a vendor's interest under a contract of conditional sale is a recordable conveyance, the cause must be remanded for trial."

This statement was not an afterthought. The trustee's Rule 9(g) statement expressly preserves this factual issue, stating:

> "5. There is a question of fact as to whether or not the Bankrupt's lease with Devcon is a contract of conditional sale." (A57)

The purchase option, which the trustee believes was part of the agreement between LCI and Devcon, was oral. Devcon's suit against Chase and LCI sought reformation of the lease to include a purchase option. (A27, A36). The trial transcript, which was never transcribed, contains ample evidence that there was an intention to include a

purchase option as part of the lease agreement. The suit between the Trustee and Devcon was settled not because the purchase option was in doubt, but because Devcon's failure to record the lease, which it claimed to be a conditional sale contract, rendered the sale invalid against the trustee. Be that as it may, a triable issue clearly exists regarding the existence of an oral purchase option and the trustee has taken all possible steps to preserve that issue should the district court's resolution of the legal issues be reversed.

## Point III

## CHASE SEEKS TO BUTTRESS ITS UNSUPPORTED ESTOPPEL DEFENSE WITH IMMATERIAL ALLEGATIONS UNSUPPORTED IN THE RECORD

The answer interposed by Chase contains the affirmative defense of equitable estoppel (A12). In reading Chase's reply brief one would think that the statute of limitations and laches had been pleaded as affirmative defenses (Reply Brief at 23, 25). These defenses were not interposed, were not considered by the court below and were accordingly not the subject of any response by plaintiff-appellee on the motions below.

Chase's cross-motion for summary judgment states "... that there is no genuine issue as to any material fact ..." (A47). In the Rule 9(g) statement submitted by Chase in opposition to the trustee's summary judgment motion and in support of Chase's summary judgment cross-motion, there are no factual allegations regarding the estoppel defense. Under the circumstances, it was clear to the district court that this affirmative defense was waived. Chase now wishes to resuscitate this affirmative defense.

Chase argues to the court:

> "As to the trustee's assertion that there is no estoppel because he notified Chase of his claim to the assigned rentals prior to consummation of Chase's settlement with Devcon (T-18), it is Chase's position that either such statements were not made or they were never properly communicated except in veiled and purposely vague terms." Reply Brief at 22.

Chase's "position" is certainly not based upon the record below, which contains a sworn statement that Chase was notified in express terms (A61). That statement stands in the record unchallenged. A challenge below would have been answered by a more detailed response. Chase cannot now argue that it was not notified of the trustee's claim or was not properly notified, when all the evidence is to the contrary.

Nor would an attack by the trustee on the chattel paper assignment at the time of Chase's seizure of the aircraft have been futile, as claimed by Chase. Reply Brief at 22. The trustee would have still had his judgment against Chase for post-petition lease payments even if Chase did not suffer by the trustee's recovery.

The materiality of District Judge Weinstein's decision in Feldman v. National Bank of North America, 74 Civ. 175 (E.D.N.Y. June 28, 1974) which decision is on appeal to this court, docket number 74-2086, is questionable. In that case the bank retained its chattel mortgage interest and the bank and trustee had executed a stipulation whereby their respective interests in the assigned lease and leased aircraft were transferred to the lessee. At bar Chase transferred away its chattel mortgage interest and there is no stipulation. A close reading of Judge Weinstein's oral decision shows that he treated the sale pursuant to stipulation as an equitable foreclosure under the chattel mortgage. There are obviously many divergent factual elements separating the two cases.

In conclusion, it is clear that Chase cannot add flesh to the bones of the equitable estoppel defense pleaded (A12). By not setting forth facts in support of this defense in its Rule 9(g) statement and by stating that there were no material facts at issue, Chase effectively waived a defense that it could not support. The trustee should not be estopped from recovering monies due the estate.

## Conclusion

The only way that Chase could perfect its security interest in the Devcon lease and the monies due thereunder was by filing the assignment with the Administrator. Chase's failure to comply with the federal act and regulations requires judgment for the trustee. The judgment below must be affirmed.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

FELDMAN,

Plaintiff-Appellee,

against

Affidavit of Personal Service

CHASE MAN. BANK,

Defendant-Appellant,

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 9th day of October 1974 at 1 Chase Manhattan Plaza, New York

deponent served the annexed upon

Milbank, Tweed, Hadley & McCloy

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 9th

day of October 1974

James Steele

Print name beneath signature

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975